IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:14-CV-00073-BO

Willie R. Etheridge Seafood Co.,	)
Wanchese Fish Co, Inc., Dewey Hemilright,	)
Oh Riley Fisheries, LLC, Slash Creek Waterworks, LLC,	)
Martin Timothy Scanlon, Glenn Hopkins	)
Running Late Fishing Enterprises, Inc.	)
Fish, Inc. Mark Cordeiro, Donald G. Elliot	)
No Respect, LLC, William Brown, Matthew Huth	)
Stanmar, Inc., Shady Lady of West Sayville, Inc.	)
White Water Fish Corporation, White Water Seafood Corp.	)
Oneals Sea Harvest, Inc.	)
Plaintiffs,	)
v.	)
	)
The Honorable Penny Pritzker,	)
Secretary of Commerce and	)
Dr. Kathryn Sullivan, Administrator of the	)
National Oceanographic and Atmospheric	)
Administration	)
	)
Defendants	)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ORDER REVERSING AGENCY ACTION

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INTRODUCTION

In this action the Plaintiffs, fishermen and shore side businesses, challenge actions of the Secretary of Commerce ("Agency" or the "Secretary") implementing Amendment 7 to the Highly Migratory Species Fisheries Management Plan ("HMS FMP") imposing new restrictions on the American pelagic longline (PLL) fleet aimed at reducing the "bycatch" of Atlantic bluefin tuna ("BFT"). While the need to maintain landings and mortality of BFT to quotas established by the International Commission for the Conservation of Atlantic Tunas (ICCAT) which implements the Atlantic Tunas Convention Act ("ATCA"), is not disputed in this action, the measures proposed by the Agency are in reality nothing more than limiting allocation of BFT to the PLL in favor of other user groups. This is occurring despite the fact that other user groups are not using their quota and that US quota will actually be increasing, based on recent scientific advice from ICCAT's Standing Committee on Research and Statistics ("SCRS") in its 2014 Report, AR007223.[1] Amendment 7's restrictions on PLL fishing pose a distinct threat to the American fishing industry and coastal communities, while depriving American consumers of healthy fish stocks. While the Agency action may reduce the catch of BFT by the PLL, the result will be a further decline in harvest of healthy stocks, like the rebuilt biomass of swordfish and healthy stocks of other tunas, by as much as 50% or more, with tens of millions in annual lost fishing revenue.

Nor are the methods chosen by the Agency consistent with the Magnuson-Stevens Fishery Conservation and Management Act ("FCMA") or other governing statutes. In particular adoption of a restrictive IBQ system threatens each and every PLL vessel. Despite utilizing its

[1] References to the Administrative Record are denoted AR######. References to the Final Amendment 7 document, starting at AR002278 are also denoted A-## indicating page within the document. Hyperlinks and URLs to the Agency website are supplied for other documents incorporated by reference in the Final Amendment 7 and other documents cited in this memorandum.

available quotas, the Agency proposes to further reduce an already dwindling fleet, making 25% of recently active vessels ineligible to obtain a BFT individual bluefin quota, and rendering about 100 other permits invalid. The proposals imposing retroactive penalties based on where people fish and paperwork issues, and unrealistically low "bycatch quota" while US quota goes uncaught, impose untested and costly monitoring requirements, and refuse to address area restrictions that actually increase bycatch. Vessels must carry untested and intrusive video monitoring systems, "display" fish to be released or discarded to video monitors and generally adjust their fishing around the schedules of camera repair personnel, rather than the natural tide and phases of the moon that govern when and where they need to fish. As a final insult, fisherman are subject to 24/7 video monitoring and fish that could be released alive must now be displayed to the video cameras, posing a threat to fish and fishermen.

In short, US PLL fishermen will be significantly disadvantaged and suffer additional expense, and landings will fall resulting in more underharvest of valuable species. Eventually other nations will seek and obtain the United States' unused ICCAT allocation of BFT, swordfish and other tunas, and the issue of bycatch will eventually be moot. The losers will be the American fishing industry, coastal communities and American consumers.

SUMMARY OF THE ARGUMENT

The objections of the Plaintiffs can roughly be summed up as follows:

The allocation scheme fails to take into account the fact that the pelagic longline fishery is the only method the United States has to harvest rebuilt stocks like swordfish, and plentiful stocks like bigeye and other tunas. BFT is often encountered where other HMS species are being caught, and limiting the PLL to 8% or less of BFT quota, without taking other measures to allow

the fleet to avoid BFT merely harbingers the end of American participation in this fishery. In the last few years, the other participants in the BFT fishery have failed to land their quotas, yet the Agency is now expanding BFT limits in other categories to increase activity, while cutting back the PLL which affects not just BFT landings but also swordfish and other species.

The Agency's chosen method is to create a so-called Individual Bluefin Quota (IBQ) where "eligible" vessels are allocated a limited quantity of BFT. Vessels not allocated IBQ, or those that exceed quota either have to buy some quota or not fish. The Agency has not identified where this quota will come from, and most users are allocated far less quota than they need, especially if they are unfortunate enough to have a large school of BFT arrive near their gear, a not uncommon occurrence. Under the IBQ system, if the fleet as a whole exceeds the combined allocation, the entire fleet will be shut down, including fishermen who have not used any of their quotas. In short, the system will prevent harvest of available quota of other species, such as swordfish. Meanwhile, the United States risks reallocation of its quota to foreign fleets that do not impose similar restrictions on their own fleets to prevent them from harvesting their quota (nor will they with ours) because they do not face the same unrealistic measures the Agency imposes on our domestic fleet, in violation of the Atlantic Tunas Convention Act requirement for domestic fisheries.

Even within design of the system, IBQ is allocated based on certain factors. Three in particular raise significant concern:

1. The Agency ruled that individuals that did not have their permit on a vessel on August 23, 2012 are ineligible to obtain IBQ, and must lease quota to fish. The

arbitrariness of this date is clear. Owners in transition from one boat to another, such as following a loss due to sinking or fire, are suddenly disadvantaged for no reason.

2. Owners that had late logbooks are also retroactively penalized and given lesser allocation.
3. Vessel owners with higher proportionate catch of BFT are also penalized, despite the fact that their landings were legal. In particular, vessels from areas like North Carolina, where inshore vessels have a higher incidence of bycatch, receive lower allocations. These vessels now can either lease the elusive quota, move to areas where there are fewer BFT, or simply cease fishing.

In short, the Agency established a set of criteria that explicitly penalize fishermen for what was then legal conduct. [2]

The Agency also had opportunity to take affirmative action to reopen areas closed years ago to assist in rebuilding swordfish stocks, but failed to do so. Opening of these areas was initially identified as a preferred alternative, but the Agency reversed course without explanation. Opening these areas would have allowed fishermen to avoid larger concentrations of BFT, but they are now forced to fish where interactions are more likely. (Another Agency imposed measure; use of circle hooks to reduce turtle interactions, reduces catch of all stocks and requires additional fishing time, which presumably increases the risk of unwanted bycatch.)

While the PLL is allocated only about 8% of the United States' allocation of BFT, the Agency has imposed additional monitoring restrictions, which require that vessels carry video monitoring systems. Fishermen must display fish to the cameras, especially for fish to be

[2] The Agency does have penalties for paperwork violations, such as tardy logbooks; the willingness to use this in the past led to the well reported and damning review of Agency enforcement policy by the Department of Commerce Office of the Inspector General. These are not cases where the tardiness of logbooks ever rose to a level where civil administrative charges were ever filed.

discarded. In addition to being untested and costly, this will likely result in interrupted trips and unnecessary downtime. The monitoring requirements actually pose additional risks to fish stocks. Fish are often released alive, but display requirements will likely result in increased discard mortality as they must be retained long enough to display to the camera. Notably, only a few years ago a PLL fisherman was fined $5,000 for holding up a marlin just long enough for it to be photographed, as it threatened the safety of the fish.

American fishermen are not oblivious to the need to protect resources, in large part to protect the viability of their businesses and communities and put food on the tables of America. At the same time, the overall intent of FCMA and in turn ATCA is to maximize our return from the resource, not to return the oceans to a pristine state untouched by humans and not to impose unnecessary and burdensome regulations on hard working Americans.

CURRENT STATUS OF THE PELAGIC LONGLINE FLEET

The Amendment 7 Administrative Record (AR) provides very little insight into the makeup and distribution of the PLL fleet, although it provides references to a number of extrinsic documents by reference which, when combined with information contained in the AR allows at least a glimpse of what the effects of the proposed regulations are.

The domestic pelagic longline fishery developed in the 1960s and is the predominant HMS fishery on the East coast of the United States. The fishery is prosecuted using small vessels, generally with crews of 3-4 persons (AR002526, A7210) in vessels of 30-90 feet. The vessels lay out baited in hooks in sets of lines, often 100s of feet long. The sets are either left attached to the vessel or allowed to drift, often attached to radio beacons. The sets are then hauled 10-14 hours later, usually onto a hydraulic powered reel, and catch is brought to the boat and physically hoisted aboard (landed) or, in the case of fish of a species or size that is not permitted, released alive if possible. The retained fish are usually manually hauled on board and

then dressed and iced in the vessel's hold. Trips may be as short as 1-2 days, or as long as 10-14 days. Trips to distant areas, such as the Grand Banks, made by the larger vessels in the fleet may take over 30 days to complete. Needless to say, the work is difficult and often round the clock.

The HMS fishery consists of a number of commercial species, primarily swordfish, BFT, bigeye, albacore, yellowfin and skipjack tunas and other common species like mahi. The landed value of these species in 2012 was $64,000,000, AR002522-24, A7-206-208, most of which are landed by the PLL. The A7 documents indicates the value of the PLL landings to be about $32,000,000 per year, comparison of the HMS combined landings table and the 2013 SAFE report, incorporated into the A7 document by reference at AR002453, A7, p. 137, the PLL is responsible for about 60% of the commercial HMS landings in 2012 making it about a $40,000,000 per year fishery, which significantly benefits coastal fishing communities from Maine to Florida and along the Gulf Coast.

The AR reports that there are 253 longline permit holders, AR002727 (A7-411). A7 allocates IBQ to 135 vessels, and excludes current 35 vessel based on lack of recent history, allowing those vessels to lease IBQ.

To date, one of the most objectionable measures to limit PLL mortality of BFT has been to discourage targeting of these fish by giving PLL vessels a very small allowance to take BFT based on the quantity of other fish on board, which leads to wasteful discards.[3] This regulatory discard has become a focus point for frequently nasty assaults on the PLL fishery by environmental groups, see AR003514 (link to repetitive comments resulting from a form letter writing campaign, mostly complaining about wasteful discards in the PLL fishery). The Agency

[3] This mandatory discard is by no means the only restriction placed on the PLL fleet. These are too lengthy to detail here, but can be seen in NOAA's HMS Commercial Fishing Compliance Guide, available http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/index.html

has required changes in fishing methods in Amendment 7, but refused to follow through with other options to reopen areas like the Charleston Bump closed area, depicted onm a chart at AR002347 (A7-31) to allow the fleet to move away from aggregations of BFT and to continue to harvest healthy stocks. The effects will be more far reaching than just the PLL fleet's catch of BFT. While the US has seldom harvested its ICCAT BFT quota, its landings of rebuilt stocks like swordfish are actually declining and represent only about 50% of the available ICCAT quota given to the US.[4] In short, the HMS fishery seems to be entering a period of significant underfishing, which will only be worsened by Amendment 7.

THE BLUEFIN TUNA FISHERY

As noted by its inclusion in the HMS FMP, BFT are highly mobile fish, capable of bursts of speed up to 45 mile per hour, and are known to travel hundreds of miles in a day. Large fish can reach 13 feet in length exceed 2,000 pounds, AR002429 (A7-113). The bluefin tuna is a highly sought after fish by both recreational and commercial fishermen. On the commercial level, it is valued for the quality of its meat, frequently shipped internationally and used in sushi and sashimi. It can be highly lucrative, with common prices of $10-$11 per pound, and occasional fish bring up to $20-30 per pound. The BFT fishery has been heavily regulated since the 1970s and 1980s under ICCAT, with significant improvement in overall stock size, recruitment and individual fish size, SCRS 2014 report, *supra*. AR007223.

The BFT fishery has five major user groups among which the ICCAT quota has traditionally been allocated-the General, Angling (non-commercial), Harpoon, Purse Seine and

[4] Statistics for the first half of the 2015 fishing year show that swordfish landings by the PLL fleet were only 37% of the base quota for this period and given carryover of underharvest from prior years, only landed about 32% of the quota for this period. NOAA Fisheries News http://www.nmfs.noaa.gov/sfa/hms/news/news_list/2015/8/swo_landings_081115.html

PLL categories.[5] All but PLL target BFT. General category and angling primarily use rod and reel and remain open access categories to anyone willing to pay a small permit fee. General category fishermen are full time commercial fishermen,[6] often seasonally targeting tuna, and many weekend warriors who derive pleasure and occasional reward from the quest for giant BFT. Purse Seiners set nets around a school of fish and close the purse to encircle their catch-there are only 4 such permits, only one or two of which have been associated with vessels in the past few years. Harpooners use hand thrown harpoons to target fish, usually from the bow pulpits of small, maneuverable vessels. This also remains an open category, but as its small landings show, it is a difficult fishery which requires skill and calm seas to prosecute. The PLL fleet doesn't currently target BFT, only because it has been prohibited from doing so. The PLL fleet catches BFT along with other species on longlines because, as the Agency notes, "the occurrence of these species overlaps as a result of their similar biology and ecology" AR002333 (A7-17). Despite the common intermixing of these species, the Agency has branded PLL catch of BFT as a "bycatch" requiring discard of legal size fish, as noted above, based not on allocation of BFT quotas.

The balance of the user groups target BFT and in addition to size limits, have different catch limits. Purse Seine vessels are governed by an overall fleet quota that can be apportioned among vessels. Harpoon vessels are given daily limits, subject to an overall fleet quota. Angling category vessels are given daily catch limits, AR002452-53(A7-126). General category vessels are afforded daily catch limits, which have increased from as low as 1 per day, up to 4 per day in recent years, to attempt to increase this sector's landings.

[5] One other user group is Charter/Head Boat-this category's landings are charged to either the angling or General category sub quotas, depending on which rules the vessel elects to operate under-often determined by the first fish the vessel retains.

[6] Currently featured on the popular reality TV show, "Wicked Tuna."

The overall breakdown of permits as of 2013 was as follows:

Angling	21,686
Charter/Headboat	3968
General	3,783
Longline	254
Harpoon	14
Trap	7
Purse seine	3

AR002727 (A7-411)

Under ICCAT, the United States has had a 923.7 mt of BFT quota to allocate among its various user groups and since 2011 has allocated quota as follows:

Angling	182 mt	19.7%
General	435.1 mt	47.10%
Harpoon	36 mt	3.9%
Purse Sein	171.8 mt	18.6%
Longline	74.8 mt	8.1% (not including dead discard allowance of 68 mt)
Trap	0.9 mt	.1%
Reserve	23.1. mt	2.5%

AR002319 (A7 3), and see 76 FR 39019; July 5, 2011, cited therein

Additionally, in order to deter the discard of BFT mandated by US law, in 2006 ICCAT modified the US quota to eliminate a 68 mt allowance for dead discards in the PLL fishery. Although the PLL has exceeded its quota of 140 mt (74.8 plus the 68 mt ICCAT allowance for dead discards), in recent years the Agency has been able to balance quotas by under-harvest, including annual carry-overs of underharvest, in other sectors, AR002333 (A7-17). The loss of the ICCAT dead discard allowance is addressed in Amendment 7, effectively spreading the loss of the 68 mt across the entire US quota, effectively taking from each sector proportionately and then applied back to the PLL sub-quota.

ARGUMENT

In the context of administrative actions under the Magnuson-Stevens Fishery Conservation and Management Act Agency decisions are evaluated under the Administrative

Procedures Act ("APA"). 5 USC §551, et seq. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1284 (1st Cir. 1996) *Associated Fisheries of Maine, Inc. v. Daley,* 127 F.3d 104, 109 (1st Cir. 1997). Under the APA standard a court may only set aside an administrative action if the action is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law …" 5 USC § 706.

The APA standard gives great deference to Agency decision making and the scope of judicial review is narrow, even at the summary judgment stage. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971) *Associated Fisheries of Maine, Inc., v Daley,* 127 F.3d 104, 109 (1st Cir. 1997) Although the Secretary's decisions are presumed to be valid, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416. Additionally, this presumption does not shield the Secretary's action from a "thorough, probing, in-depth review." *Id.* at 415. Although the court's inquiry is to be searching and careful, the ultimate standard of review is a narrow one. See *Overton Park,* 401 U.S. at 416. The role of the reviewing court is to '"consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.'" *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (citing *Overton Park, 401 U.S. at 416*). "A reviewing court may decide only whether [the Secretary's] discretion [**33] was exercised rationally and consistently with the standards set by Congress . . . and may not substitute its own judgment as to values and priorities for that of the Secretary." *Maine v. Kreps,* 563 F.2d 1052, 1055 (1st Cir. 1977). "With

respect to a court's review of a specific regulation adopted by an agency pursuant to its delegated authority,

> "[the] regulation will be found to be arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Connecticut v. Daley*, 53 F. Supp. 2d 147, 157 (D. Conn. 1999) (citing *Southeastern Fisheries Ass'n, inc. v. Mosbacher*, 773 F. Supp. 435, 439 (D.D.C. 1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443))

The Agency's statutory jurisdiction for the actions in this case is derived from and governed by the Atlantic Tunas Convention Act which at 16 USC § 971d(c)(1)(C) incorporates the provisions of the FCMA relevant to Fishery Management Plans ("FMP"), 16 USC § 1801. The FCMA provides, *inter alia*, ten National Standards that serve as the basic considerations in developing management plans and for all management decisions involving domestic marine fisheries, 18 USC § 1851 (a)(1-10). The FCMA also provides additional requirements for Secretarial plans establishing measures to regulate Atlantic Highly Migratory Species fisheries, 16 USC § 1854 (g)(1)(A-G).

Procedurally, these matters are decided by the District Court on an analysis which is best described as a motion for summary judgment. Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. CIV. P. 56(c)*. In a case involving review of a final agency action under the APA, however, the standard set forth in *Rule 56(c)* does not apply because of the limited role of a court in reviewing the administrative record. *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006). Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the

administrative record permitted the agency to make the decision it did." See *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769-70 (9th Cir. 1985); see also *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.,* 18 F.3d 1468, 1472 (9th Cir. 1994) This case involves review of a final agency determination under the APA; therefore, resolution of the matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record. *Stuttering Found of Am. v Springer,* 498 F. Supp. 2d at 207. Accordingly, in reviewing the cross-motions for summary judgment, the Court must determine if the Agency's actions are justified and in compliance with the governing statute and the APA based on the Administrative Record.

THE AGENCY'S ACTIONS ARE ARBITRARY AND CAPRICIOUS AND NOT IN COMPLIANCE WITH THE APPLICABLE NATIONAL STANDARDS UNDER MAGNUSON

Plaintiffs contend that Agency action that reduces and eliminates significant landings of healthy stocks like swordfish, to preserve allocations to other categories who are not harvesting their current quotas is, on its face, arbitrary and capricious. Preservation of these landings does not even appear as an objective in the Agency's documents. The Agency stated in the Amendment 7 FEIS :

Objectives: NMFS identified the following objectives with regard to this proposed action:

- Prevent overfishing and rebuild bluefin tuna, achieve on a continuing basis optimum yield, and minimize bluefin bycatch to the extent practicable by ensuring that domestic bluefin tuna fisheries continue to operate within the overall TAC set by ICCAT consistent with the existing rebuilding plan;
- Optimize the ability for all permit categories to harvest their full bluefin quota allocations; account for mortality associated with discarded bluefin in all categories; maintain flexibility of the regulations to account for the highly variable nature of the bluefin fisheries; and maintain fairness among permit/quota categories;
- Reduce dead discards of bluefin tuna and minimize reductions in target catch in both directed and incidental bluefin fisheries, to the extent practicable;

- Improve the scope and quality of catch data through enhanced reporting and monitoring to ensure that landings and dead discards do not exceed the quota and to improve accounting for all sources of fishing mortality;
- Adjust other aspects of the 2006 Consolidated HMS FMP as necessary and appropriate.

AR002325[7]

Only by largely ignoring the economic loss to PLL fishermen and product to consumers can it justify its actions. Reallocation of BFT that is not being caught has no impact on other elements of the fleet. The Agency has not adequately balanced the significant impacts of the measures on Optimum Yield on other stocks managed within the same FMP with the negligible impact reallocation might have had on other sectors within the BFT fishery. This treatment of the PLL fishermen indicates a disregard for National Standards, thereby rendering the Agency's action arbitrary and capricious and not in accordance with the governing statute, *Hall v. Evans,* 165 F. Supp. 2nd 114 DC RI 2001.

As the Agency notes, it is expected that a certain quantity of BFT are going to be caught along with other plentiful target species within the PLL HMS fishery, and Amendment 7 indicates that despite best efforts, it is unavoidable and unpredictable, AR002333 (A7-17). It is actually likely to increase, as swordfish is rebuilt, and the BFT stock are rebuilding, and thus increasing. Interactions can only rise which, in a commercial fishing friendly environment, would be favorable, SCRS Report, supra. Under the current philosophy, the only possible result is to further restrict PLL fishing. Under the FCMA, with regard to the regulation of Atlantic Highly Migratory Species, the Secretary is required, *inter alia,* to:

> "…(c)evaluate the likely effects, if any, of conservation and management measures on participants in the affected fisheries and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors;

[7] Interestingly, there has never been a determination of the discard mortality fo the two largest user groups- the General Category and the Angling category. With size limits and no real size selectivity to the gear they use, many fish are brought to the surface after a long fight, only to be released to an unknown fate
.

> (D) with respect to a highly migratory species for which the United States is authorized to harvest an allocation, quota, or at a fishing mortality level under a relevant international fishery agreement, provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation, quota, or at such fishing mortality level;
> 16 USC § 854

Plaintiffs contend that despite significant efforts expended on formulating Amendment 7, the Agency did no meaningful analysis of the impact of the proposed measures on the PLL fleet in terms of their effect on overall harvest in the HMS fishery because politically, allocation of the quota need by the PLL was unacceptable, as exemplified by the numerous comments generated in the AR and the large number of permit holders in those categories. The Agency's action imposes severe restrictions on the PLL fleet, while the other sectors, notably Purse Seine and General Category, all continue to experience underharvest, AR002386. The balancing performed by the Agency only analyses the value of BFT allocation adjustments-it does not balance, for example, the potential relative costs of BFT quota allocation for the other fleets with the potential losses of the PLL fleet from both BFT quota adjustment and the effect on other HMS species like swordfish other than in broad terms. For example, the Agency indicates a potential loss of $56,000 per vessel if no BFT leasing occurs, AR002760 (A7-444). Yet, 35 vessels receive ***no*** allocation (because they did not have a permit issues on August 22, 2012) and those that do still have insufficient allocation if there is any change in BFT movement-their loss will be 100% of their HMS landings-and since the fleet is not currently restricted by quota, .there is no capacity to make up for what these ineligible vessels were landing To a small vessel, a $56,000 reduction in gross landings, combined with costs of cameras, estimated at $5,800 annually per vessel, AR002780 (A7-464) , delays attendant to monitoring, etc… may be sufficient to force the vessel below profitability, sending the fleet in a downward spiral, further reducing yield of other stocks. The PLL fleet, which, according landed almost $40,000,000 of

fish in 2012, will experience at least a 25% overall reduction in overall HMS landings including swordfish and BAYS tunas simply because of individual vessels' lack of available quota, and in the event a vessel or number of vessels significantly exceed their IBQs, potential shutdown of the entire fleet. Vessel quota allocations are initially calculated at 0.0 mt, .51 mt, .82 mt and 1.58 mt, AR002386. In terms of fish, each BFT weighs approximately 0.125 mt in the Atlantic and 0.25 mt in the Gulf of Mexico, AR002386. PLL vessels that land $300-400,000 per year in HMS species, if they meet the criteria to even be allocated BFT, are given as few as 4 fish per year-or even less as quota use is based on **actual weight**, not the estimated average the Agency offers, AR002386(A7 p. 70). Any shift in BFT distribution can significantly and unexpectedly alter BFT catch, with disastrous consequences for vessels that have insufficient IBQ. Although "leasing" or transfer of quota is theoretically possible, the Agency does not indicate how a fisherman will find quota or how much he will have to pay for quota that he doesn't really want to catch (or its effect on fleet economics), concerns raised by a number of commenters, see AR0006285, comments of one long line fishermen concerned about the complexity of IBQ leasing. If the fishermen has less than he needs he risks a fine, and eventually can't leave port if his available quota falls below the threshold. Common sense tells us it is an unworkable situation, since PLL fishermen can really only be harmed by landing BFT. If a fisherman intends to fish at all, he cannot risk leasing quota, even if he has had few BFT interactions, particularly in light of growing BFT stocks and changes in spatial distribution of stocks from changing water temperatures.[8] The Agency does not allow fishermen who don't use quota to "roll it over" into subsequent years, which would give some level of comfort to fishermen to lease quota after a

[8] One aspect given passing reference in amendment 7 AR002758 (A7-464)is the effect of leasing BFT quota on future allocations. Generally, allocation is based on fishing history, and vessel that have a history or have more history iiof landing fish gain greater privileges. Under the Amendment 7, fishing history accrues to the benefit of the lessee and not the lessor, so prospective Lessors may be reluctant to risk future access for relatively small lease fees.

year of experience under the system, as they could essentially lease unused quota. In short, the system, as implemented, does not offer much relief to PLL fishermen, and certainly does not address the basic issue of the adequacy of BFT allocation for the harvest of other HMS stocks.

Amendment 7 requires the PLL fishery to be closed once the Agency determines the PLL quota will be fully utilized. This can happen if some vessels exceed their IBQ, effectively negating the IBQ of others. As the Agency noted, a few vessels caught most of the BFT. Although quota will be reduced in those vessels' IBQ in the following year, in extreme cases, it could also result in the entire fleet's quota being reduced. For fishermen whose season is abruptly cut short by the BFT catch of others, the quota is lost-there is no carry-over. In effect, fishermen get their own IBQ, but still bear the cost of overages by others.

That the allocation scheme is arbitrary and capricious is demonstrated by the General Category which remains open access. Anyone who wants to target BFT can, merely by paying a fee, obtain a General Category permit, and harvest up to four BFT per day, every day, regardless of weight. In effect, an individual or business can enter the General Category fishery, and ***every day*** land more BFT than a commercial PLL is allocated for an ***entire year***. While PLL fishing is being restricted, the inability of the General Category to harvest its quota has led the Agency to increase landings up to 4 fish per day for all of the category's members during portions of the year. This period has been expanding as the category's landings fall short. The purse seine category also fails to harvest its quota, with only 2 of the 5 permits actually issued to vessels, only one of which is actually fishing, in large part because of regulatory restrictions imposed by

the Agency.[9] This approach has been criticized by many commenters from the PLL fleet and by one of the most highly respected BFT scientists, Dr. Molly Lutcavage, AR005717.

The Agency's actions also fail to address the problem that, as until the PLL fleet is shut down completely, vessels will likely continue to exceed their IBQs. As the Agency notes in the A7 document, very few vessels had significant interaction with BFT, and the fleet-wide restrictions are based on these few vessels' BFT landings and discards. The Agency's action does nothing to protect vessels that had no interaction from, for example, being completely excluded from the fishery based on the "recent activity" requirement. Nor does it address the needs of vessels that have significant catch of BFT because of environmental conditions or based on the proximity of their home port to areas where BFT have, for whatever reason, decided to congregate. In such an instance, a vessel landing a few BFT in the first months of the fishing year would effectively be shut down, resulting in a significant loss of the vessel's annual income- as much as 90% or more, AR 2774 (A7-458) The effect of the new regulations may be too early to completely predict, as the Agency's analysis never considered the simple loss of overall HMS effort as vessels are forced from the fishery. Here the Agency has consciously ignored its own data and does not even hint at the economic devastation which will befall vessels allocated no or insufficient quota,[10] which is grounds to reverse the Agency's action, *North Carolina Fisheries Ass'n v. Daley*, 27 F.Supp. 2d 650, 659-60(E.D. Va. 1998) (holding that the NMFS's economic analysis did not satisfy the RFA because it "consciously ignored [its] own data and selected a flawed methodology" to analyze the flounder fishery) As noted above, swordfish landings, which

[9] In large part this is due to the Agency's failure to adjust size restrictions on this category to conform to current fish stock demographics, despite the Agency's statement that Amendment 7 was intended to assist the fleets in landing their allocated quota.

[10] The Agency does provide general analyses about average vessel losses, assuming the loss is spread evenly over the fishery of $1,800,000, which analysis ignores the reality of the action, as 35 vessels do not get any quota and cannot set out on a trip unless and until they lease it. As catches vary, vessels that haven't encountered any or very few BFT in the past may suddenly encounter large numbers of these fish, and then have insufficient quota to continue fishing.

were at 80% of the US quota in 2012, have declined to about 37% as of August of this year, according to the latest Agency statistics. Under the FCMA:

> Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry
> National Standard One, 16 USC § 1851 (a)(1)

The Agency had mechanisms for addressing the concern that the PLL might exceed its quota, by reallocating quota on a permanent, or on an *ad hoc* basis, as it had in the past, but instead chose the single most harmful measure for the PLL, which guarantees that it will fall far below optimum yield in all other HMS fisheries. It would not be surprising if the overall loss of HMS harvest were to exceed 50%, or a loss to the Nation or over $20,000,000 per year in wholesome food. With the economic multiplier associated of 5 to 7 times landings, the loss of many small businesses, adding to further decline in our Nation's fishing communities. The result appears not to be driven by the statute, but rather the result of the many anti-PLL parties, throwing another sector of the fishing industry under the bus. Clearly, recreational fishing interests want to see their allocation preserved, if not increased, but for the general American consumer who can't afford a 60' sport boat, fuel and the time it takes to actually fish, commercial fishermen are their only access to the resource. As the Secretary notes in his own National Standard Guidelines:

> *Other factors.* In designing an allocation scheme, a Council should consider other factors relevant to the FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery by present participants and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing.
> 50 CFR 600.325[11]

[11] While it is frequently stated that the National Standards Guidelines set out at 50 CFR 600 are not binding, they are nonetheless a statement of the Secretary's interpretation of the governing statute.

The FCMA also contemplates this situation, when it provides that

> If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation;
> National Standard Four, 16 USC § 1851 (a)(4)

While fairness and equity are tough to implement, allocating a limited resource away from fishermen who need it to harvest large quantities of fish, in favor of other sectors who are underharvesting their own quota is neither fair nor equitable to either the PLL fishermen or their customers, whom the Agency is supposed to consider in assessing whether, for example, its proposed regulations achieve optimum yield as required by National Standard One, 16 USC § 1851 (1), and analysis of Optimum Yield under and FMP is also required in assessing allocation schemes, 50 CFR 600.325(c)(2). The Agency completely failed to consider, except in a fleeting portion of the Amendment 7 document, AR002774(A7-458) the economic loss suffered by the fishermen and their communities, and the consuming public, to the extent that there is no evidence that it complied with its duties under the FCMA, and a fair reading of the document establishes no justification for the ultimate result. In effect, the Agency has sacrificed a $40,000,000 a year fishery to avoid making a tough allocation decision over 100 mt of BFT quota, without justifying its action, simply by failing to address other fisheries impacted under the same FMP.

Plaintiffs contend that to a large extent, the limitation of the quota to the PLL fleet and the establishment of the IBQ program was essentially a political compromise, the dynamics of which are driven by the large number of non-PLL permit holders - 30,836 versus the relatively small PLL fleet, with only 252 permit holders, combined with a strong, anti-PLL drive by a number of conservation groups, who organized bulk comment drives. As stated in *Parravano v. Babbitt*

> "There is nothing improper with compromise per se. Indeed, much of the Magnuson Act process is designed to facilitate compromise between various competing interests. However, the purpose of the Magnuson Act is to ensure that such compromise decisions are adequately explained and based on the best scientific evidence available-and not simply a matter of compromise."
> *Parravano v. Babbitt,* 837 F. Supp. 1034 (N.D. Cal. 1993)

Though "the Magnuson Act permits the Secretary's designees to act on information that is incomplete or if there are differences in available information," it does not condone regulations promulgated entirely for the sake of compromise not braced by any scientific evidence. *J.H. Miles & Co. v Brown,* 910 F. Supp. 1138 at 1152; see *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998). The compromise is largely driven by the vilification of the PLL, driven largely by the fleet discard of BFT, which the Agency itself mandates! The failure of the Agency to assess or consider the negative impact of restricting the PLL fleet to a BFT quota too low to actually harvest its allocation of swordfish is not surprising and obscures the avoidable impact on the harvest of other HMS species, AR (A7 409-420) by restricting analysis of financial impact of quota reallocation proposals to the value of the BFT fish, and does not take into account the other affected HMS fisheries.[12] The Agency fails to assess and account for the harm to the yield in the other HMS fisheries, such as actually serves other interests, as there is little, if any, advantage to the PLL fleet in Amendment 7. The eventual impact of the restriction of the PLL fleet to an insufficient allocation of BFT to land its other target species will be the loss of fishing businesses and decline of fishing communities, negatively impacting not only commercial fishing, but undermining an important part of American culture, since this Nation's economic foundation was based on commercial fishing. Even small vestiges of the fishing industry provide the backdrop for healthy coastal working towns with strong tourism-

[12] The Agency really only analyzes the financial impact on other PLL HMS landings when it assesses the impacts of early shutdowns of the PLL fishery once BFT quota or IBQ is exhausted, AR002774 (A7-458).

loss of the industry destroys infrastructure and results in residential expansion and gentrification. Again, the National Standards provide direction:

> Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities
> National Standard Four, 16 USC § 1851 (a)(4)

Nothing in the Amendment 7 materials shows that the Agency weighed community impact based on the lack of necessary quota to achieve optimum yield on HMS stocks other than BFT. While recreational fishing has significant positive impacts on shore side communities, commercial landings have a recognized multiplier effect, with economic activity generally recognized as being 5-7 times the value of the fish landed. It also reduces the amount of fish being imported. Having failed to acknowledge the impact of IBQ implementation, the Agency clearly did not properly address the impact on communities, and failed to adopt a strategy to minimize economic impacts on them.

THE IMPLEMENTATION OF THE IBQ QUOTA PROGRAM FAILS TO COMPLY WITH THE FCMA

In addition to the basic failure of the Agency's allocation scheme, the implementation of the IBQ system itself violates the letter and intent of the FCMA both in terms of allocation and in terms of implementation.

As noted above, the IBQ scheme allocates based on three "metrics,"

1. The ration of BFT to target species, with vessel receiving a lower initial IBQ allocation based on a higher percentage of landings
2. Timely filing of logbooks
3. Compliance with observer requirements.

AR002350-54 (A7-34-38)

The effect of each of these is to penalize fishermen for factors which may be completely out of their control, such as the fortuitous catch of BFT based, for example, on the port from which they fish. Such a result violates National Standard Six which provides:

> Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches
> National Standard Six, 16 USC § 1851 (a)(6)

It is apparent that due to frequent changes in location and concentration of the highly migratory BFT, interactions of the PLL fleet with BFT may change dramatically and without warning. As the North Carolina Division of Marine Fisheries reported in its comments, a decided change in fishing patterns increased interactions off of the coast of North Carolina, Comments of North Carolina Department of Environment and Natural Resources AR006248. Clearly, fishermen cannot be penalized for natural fluctuations in spatial distribution of fish stocks and all three metrics penalize fishermen for conduct without complying with FCMA procedures for restriction of fishing privileges which require notice and opportunity to heard with fishermen having fair warning ogf possible ranges of penalties, 16 USC § 1857 (g). The sanction is also implemented *ex post facto* without any due process protections, in apparent violation of the 14th Amendment to the United States Constitution. Fishermen were also rated on their past compliance with a seven day filing requirement for logbooks following the end of each month, AR002354 (A7-38)-It is difficult to comprehend the punitive effect of these metrics on fishermen, based on rules implemented after the fact.

Plaintiffs also note one peculiar aspect of the IBQ qualification- the requirement that a permit be valid on a specified date, August 23, 2012. Such "control dates" are frequently used to notify fishermen that their fishery history (activity) prior to the control date may affect their subsequent access-this requirement alone rendered 35 vessels ineligible for initial IBQ

allocations, AR 002382 (A7-66). This is primarily intended to deter speculative entry when management measures are proposed. Generally, Fishery Management Plans base future access to those who held permits and had some level of fishing activity before the control date. In the undersigned's 20+ year experience in the fisheries management, Amendment 7 is the first to require a permit on a specific date. This is clearly arbitrary as it does not provide for boats that had sufficient fishing history, but were in transition from one owner to another, vessels that were in the process of being replaced due to, for example, fire or sinking. While fishing activity prior to a date is an accepted qualifier, happenstance of not having a permit actually issued on a single day is arbitrary and capricious- the Agency offers no justification or analysis for this requirement.

THE IBQ REQUIREMENTS ARE INTRUSIVE, NOT ECONOMICALLY JUSTIFIED, DANGEROUS AND WILL BE INEFFECTIVE AND BURDENSOME, AND VIOLATE THE NATIONAL STANDARDS.

Amendment 7 imposes significant and burdensome requirements on the PLL fleet that no other BFT category faces. In addition to electronic positon monitoring, manual logbooks, daily electronic catch reporting and occasional mandatory observer coverage, in order to enforce the IBQ program, each vessel is required to have on board a video monitoring system that records during the haul back of the fishing gear. It monitors what occurs on deck, and fishermen are required to display fish to the camera to verify discards, or as one fisherman phrased it, make the fish "smile for the camera," a difficult task on a small vessel at sea at night.

The systems are standard video systems, neither modified for nor tested in marine environments. Although many systems were initially supplied by the Agency, the number of systems was limited and the Agency indicated that vessels that were not eligible for IBQ might be eligible for systems after all eligible vessels were so equipped. With the systems, fishermen

cannot leave port, and must return in the middle of a trip, if the system malfunctions. Video cartridges must be returned to the Agency, who will then copy the materials and return the cartridges for re-use. A vessel can't leave port if the Agency hasn't returned sufficient video cartridges to make another trip. If discrepancies are noted between the video and reported discards, then fishermen may be required to pay for an "audit" at considerable expense. These video requirements are in addition to paper logbooks, daily reporting and requirements to carry adequate observer coverage on HMS vessels. This level of additional expense and duplication of effort violates national Standard Eight which states:

> Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication
> National Standard Eight, 16 USC § 1851 (a)(8)

HMS fishermen fish based largely on moon phases, currents and weather. Dockside delays to sort out complicated video issues or await the return of video cartridges from the Agency will negatively impact fishermen's ability to keep to a schedule that allows profitability. Eventually, predictably, these costs, with initial installation estimated at $3,500, will be passed on to fishermen, further undermining what little profits exist in this industry. The requirements are extensive and virtually impossible for small vessel owners to comply with, 60 CFR 635.9. As noted in the HMS commercial fishing Compliance Guide, fishermen are currently subjected to, *inter alia*,[13] electronic position reporting, vessel logbooks and daily electronic reporting, while still being required to carry observers. Video monitoring, which will result in little more observation of their activity than actual observer coverage is both intrusive and unwarranted.

The requirements for video monitoring conflict with National Standard Nine, which provides that:

[13] Other requirements include gear modification, mandatory marine mammal disentanglement training, traveling around area closures, trip limits…

> Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.
> National Standard Nine, 16 USC § 1851 (a)(9)

In the past, the Agency's regulations have been strict in requiring that "bycatch" be released immediately, to reduce risk of harm.

> An Atlantic HMS harvested from its management unit that is not retained must be released in a manner that will ensure maximum probability of survival, but without removing the fish from the water
> 50 CFR 635.21(1)

> Any [sharks] that are to be released cannot be brought onboard the vessel and must be released in the water in a manner that maximizes survival
> 50 CFR 635.24(a)(6) (sharks)

These regulations are consistent with National Standard Nine, and the National Standards Guidelines, 50 CFR 600. In contradiction to these required protections, Amendment 7 requires that

> "*Handling of fish and duties of care.* The vessel owner or operator must ensure that all fish that are caught, even those that are released, are handled in a manner that enables the video system to record such fish, and must ensure that all handling and retention of bluefin tuna occurs in accordance with relevant regulations and the operational procedures outlined in the FMP. The vessel owner or operator is responsible for ensuring the proper continuous functioning of the EM system, including that the EM system must remain powered on for the duration of each fishing trip from the time of departure to time of return; cameras must be cleaned routinely; and EM system components must not be tampered with."
> 50 CFR 635.9 (e)(3)

On small vessels, catch is frequently released at the side of the vessel, wherever the fish is brought alongside. This new requirement requires all fish to be brought to a camera and displayed, so that it can be identified, greatly increasing the risk of harm to the fish. In the case of sharks, or any large fish, it also creates a significant and unnecessary risk of injury, in violation of National Standard Ten which provides:

> Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea
> National Standard Ten, 16 USC § 1851 (a)(10)

The safety factors and risk of injuring fish caused by the display requirement are not even discussed in the Amendment 7 materials, and were not considered by the Agency, and as such are arbitrary and capricious and not in accordance with the FCMA.

Plaintiffs note that the PLL is allocated 8.1% of the BFT quota. In 2013, the Agency issued 31,088 permits of which less than 1% were PLL permits. Despite this, the PLL is burdened with almost 100% of the cost of monitoring. There is no justification for this level of monitoring, where most user groups have few, if any, requirements to account for discards. Although the Agency has found some funding to pay for installation of video monitoring systems on PLL vessels, priority is given to IBQ eligible vessels. Those denied initial allocation may have to pay for the monitoring system, in addition to having to buy quota to fish.[14]

Plaintiffs contend a better approach would have been to adjust overall allocations between categories, either as a codified change or on an *ad hoc* basis, while continuing to adjust other measures, such as closed areas, to allow the PLL fleet to continue to harvest its other target species, while continuing to work to avoid BFT. The expansion of those categories could best be deferred until additional quota is made available through ICCAT.

THE AGENCY FAILED TO PROPERLY ADDRESS PROPOSALS TO OPEN THE CHARLESTON BUMP AREA TO ALLOW HMS HARVESTS IN AREAS WITH LOW BFT INTERACTION

The Agency failed to actually address alternative measures to reduce BFT interaction, such as closures which are really not serving their intended purpose. Such measures would allow continued and possibly increased harvest of HMS species such as swordfish, while allowing the

[14] http://www.nmfs.noaa.gov/sfa/hms/news/news_list/2015/4/a7_em_additional_information_040315.html

PLL fleet to move away from BFT. In the early drafts of Amendment 7, AR000916-000920, the Agency considered reopening an area known as the Charleston Bump. The Charleston Bump Closed Area extends from the shore between Wilmington Beach, NC and Jekyll Island, GA out to a north south line 200 miles east of Wilmington and about 380 miles east of Jekyll Island, See HMS Commercial Compliance Guide, supra. It is closed from February 1 to April 30 of each year, and creates a barrier that forces vessels fishing from North Carolina to clump together, actually increasing the risk of BFT interaction.[15] At least one commenter offered analysis showing the problems created by this type of closed area, where BFT fail to understand the significance of lines drawn in the water, resulting in forced concentrations of fishing effort in precisely the areas that need to be avoided, Lutcavage AR005717. Growing populations of BFT throughout the Western Atlantic as noted in the SCRS report, supra, including in the waters off of North Carolina threaten the viability of fishermen from this state who participate in the PLL fishery. Plaintiffs contend that if, as the Agency claimed, the intent of Amendment 7 was to reduce bycatch and discard mortality of BFT, and it should have reopened these areas and allowed fishermen to move away from BFT concentrations. That the Agency failed to do so indicates it has failed to pursue those options best suited to solving the problem at hand in favor of political expediency.

CONCLUSION

In implementing Amendment 7, the Agency remained focused on one concept, limiting the PLL fleet to a bluefin tuna allocation, in favor of other groups who are not harvesting their existing quotas. In so doing, the pelagic longline fleet receives insufficient bluefin tuna quota to allow it to harvest other stocks and prevents it from maintaining current levels, no less attaining

[15] , see HMS Commercial Compliance Guide available at http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/index.html for a full description of closed areas and other restrictions on the PLL.

Optimum Yield, in its harvest of other stocks and is being placed in a position where it cannot reasonably harvest quota available under international quota allocations, thereby placing it at a competitive disadvantage with foreign competitors. Rather than re-allocate quota, or adjust other measures such as reconfiguring existing closed areas, the Agency instead imposes a costly and unworkable individual transferable quota system with little prospect of success. The driving force behind the reluctance to make the unpopular yet necessary adjustments to quota allocation among user groups, or other measures, is largely driven by the political climate resulting from the Agency's own actions mandating discards of bluefin tuna. Plaintiffs contend that the Agency's failure to properly consider the negative impact of the final Amendment 7 measures, and adoption of measures in direct contradiction to the National Standards, proves the measures to be arbitrary and capricious and in violation of the empowering statute, and must therefore be vacated in whole or in part.

Respectfully submitted,

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